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IN THE

Supreme Court of the United States

October Term, 1952.
No. 407.

SIDNEY KROSS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner seeks review by this Honorable Court of the Decision of the District Court of Appeal, Division Two, of the State of California affirming his conviction of these crimes: Two counts of grant theft; two counts of burglary in the second degree, for which he was sentenced to the State prison for the terms prescribed by law, Counts 1 and 3 to run concurrently but consecutive to Counts 2 and 4 which were ordered to run concurrently. (*People v. Kross,* 112 A. C. A. 701.) A hearing was denied by the California Supreme Court on September 6, 1952. [R. p. 87.]

Jurisdictional Question.

Petitioner asserts that he was denied due process of law on the following ground:

That where newspaper photographers contact a defendant in a criminal case during a court recess to take his picture and where the defendant refuses to pose but hides his face in an effort to escape being photographed, four jurors having returned to the jury box, such occurrence results in a deprivation of a fair trial and due process, even though neither the trial judge nor the prosecutor were responsible for the actions of the photographers, and the jury were immediately instructed to disregard any such activity.

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with two counts of grand theft and two counts of burglary. Petitioner entered a plea of not guilty as charged. In a trial before a jury, petitioner was found guilty as charged, the jury finding that the burglaries were of the second degree. Motion for new trial was denied; application for probation was denied; and petitioner was sentenced to the State prison for the term prescribed by law, the sentences under Counts 1 and 3 to run concurrently but consecutive to Counts 2 and 4 which were ordered to run concurrently. [R. pp. 50-51.]

Statement of the Facts.

The facts demonstrating petitioner's guilt of the crimes charged, as found by the California District Court of Appeal, are set out in the Transcript of Record at pages 75 through 80. As revealed by the District Court's opinion, this case involves appellant's entry of two fur stores in Los Angeles with the intent to steal valuable furs and his success in perpetrating the thefts. Petitioner's guilt was proved by evidence of percipient witnesses who placed him at the scenes of the crimes and who established the *corpus delicti* of each theft. Other facts were presented connecting petitioner with the crimes: flight upon being recognized by his victims; failing to halt his flight even though commanded to stop by a police officer; false reasons for his presence at the fur salons; the use of false names at the salons and when arrested; attempted bribe of a police officer; the giving of a false story as to the time of his arrival in Los Angeles from Chicago and as to his place of residence in this city; evidence of a common scheme in obtaining access to the fur salon; evidence of a *modus operandi* in secreting fur garments in his loose fitting clothing; the discovery of hairs from furs, such as those stolen, adhering to the inside of his trousers and on his socks.

The evidence produced by the prosecution was uncontroverted, and appellant failed to take the stand in his own behalf.

ARGUMENT.

I.

Petitioner Was Not Denied a Fair Trial or Due Process of Law by Reason of the Fact That Photographers Took His Picture During a Court Recess Where Neither the Court nor the Prosecutor Were Responsible Therefor.

In considering the question raised by the petitioner herein, it should be pointed out that two motions were made based upon the actions of the photographers. The first was a motion for a mistrial [R. p. 5]; the second was a motion for a new trial after the verdicts of guilty were entered. [R. pp. 49-50.] In the petition for writ of certiorari, the facts presented to the trial court at the time of the motion for mistrial have been merged without distinction with allegations contained in petitioner's affidavit filed in support of the motion for new trial. At the motion for mistrial petitioner's trial counsel presented these facts for the court's consideration:

At the morning recess, photographers endeavored to obtain petitioner's picture while he was seated at the counsel table. Petitioner had his head down with a handkerchief over his eyes. The court was not in session at the time, and the trial judge was in his chambers. One of the photographers had a motion picture camera. Trial counsel for petitioner took the position that the court had ordered the bailiff to clear the courtroom of the reporters and to summon the jurors. Apparently, then, the four jurors seen in the box had entered during the close of the regular morning recess period. [R. pp. 54-55.]

The comment of the trial judge concerning the occurrence was:

> ". . . It might have arisen in the hallway. Pictures and photographers exercising whatever rights they deem they have made even against the wishes and desires of the defendant; they might have attempted to take his picture in the hallway, and the jurors pass to and fro, and that is a situation over which the Court has absolutely no control. Those pictures might or might not have reached the public eye through the medium of the press. I think the defendant and the prosecution both have a right to assume that the jurors were going to follow their oath, that they will not decide this case on anything except the evidence introduced before them in this case, which means the evidence while the Court is in session." [R. pp. 55-56.]

Upon resuming the bench, the trial judge admonished the jury as follows:

> "Ladies and gentlemen, during the morning recess certain events occurred, some of which may have been seen by some of you. At an appropriate time you will be instructed, as you have already been advised in your examination, that the guilt or the innocence of any defendant and this defendant in particular is to be decided only from the evidence adduced during the trial of the case and from no other source whatsoever. I, therefore, admonish you that whatever any of you may have seen this morning is not evidence in this case; it is not to be considered by you in any way, shape or nature in deciding the issues which will be ultimately presented to . . ." [R. p. 56.]

At the time of the motion for a new trial it was stipulated that if petitioner's trial counsel testified he would testify to the same facts and, additionally, that counsel was trying to act as a screen between the cameras and his client; that the first time he saw any jurors was when he turned and saw four of them in the box, and others were preparing to file in. Again it appears that the jurors began to enter the courtroom near the end of the recess period. Petitioner's counsel and the deputy district attorney both immediately went into chambers and informed the judge of the situation [R. p. 65], and the judge forthwith ordered the jurors returned to the jury-room. [R. pp. 65-66.]

The only reference to any comments made by the photographers is contained in an affidavit executed by the petitioner to support his motion for a new trial.

In view of the record, we take issue with the assertions of fact found on pages 3 and 12 of the petition. The trial judge did not "hurriedly" leave the bench. He called a morning recess, and the inference seems clear that he did not leave any jurors in the box. The four jurors seen in the box had just filed in near the close of the recess period. At the time of the motion for mistrial there was no evidence that the photographers made any comment which these four jurors could have heard. The trial judge, in ruling on the motion for new trial, was not bound to accept the allegations made in the petitioner's affidavit that such remarks were made. Indeed, at the time of the latter motion trial counsel who was near petitioner at the time in question again was silent as to any such purported remarks.

On pages 3, 5 and 13 of the petition it is stated that there were television cameramen present. We wish to

make it clear that there is nothing in the record about any television cameras or equipment except the averments in the aforesaid affidavit. There is evidence that one photographer had a motion picture camera, but no evidence that the matter was being televised. [R. p. 62.]

It is respondent's position that no Federal question is raised by the foregoing facts and that the writ should be denied. Where guilt is overwhelmingly established, as it was in this case, the burden is upon the petitioner to demonstrate clearly the deprivation of due process by State action. What was the State action in this case? Petitioner asserts that the persistency of the press representatives, srangers to the litigation, became State action because the trial judge spent the recess in his chambers. The affirmative action of the trial judge upon learning of the occurrence was to order the jurors returned to the juryroom immediately. Another assertion is that because the bailiff allowed the jurors to begin filing into the courtroom before the photographers were removed, there was wilful disregard for the petitioner's rights. The record does not support this assertion. The inferences which arise from the record are that four jurors may have seen the situation at a time near the end of the recess period when the jury was being brought in from the juryroom; that immediately the judge became apprised of the situation and ordered them withdrawn. Upon reconvening the court, he admonished the jury to disregard anything which took place during the recess and told them that they were to be guided solely by the evidence adduced during the trial. The action and desire of the duly constituted authorities of this State, therefore, were directed not to the deprivation of any of the petitioner's rights but to the safeguarding of those rights.

A state may regulate the procedure of its courts.

Beazell v. Ohio, 269 U. S. 167, 170, 46 S. Ct. 68, 69;

Ocampo v. United States, 234 U. S. 99, 34 S. Ct. 712, 715;

Mallett v. North Carolina, 181 U. S. 589, 21 S. Ct. 730, 733-734.

The question of whether there has been any prejudicial irregularity is addressed first to the trial court and thence to the state appellate courts. Article VI, Section 4½ of the California Constitution directs the appellate courts of this State to determine whether any alleged error has resulted in a miscarriage of justice. On two occasions the attention of the trial court in this case was called to the occurrence here complained of, and that court determined that the ends of justice were served by an admonition to the jury to disregard any extraneous matter. Next the California District Court of Appeal reviewed petitioner's contention and the record, and its discussion of the matter is found on pages 82-83 of the Transcript of Record. Based upon prior decisions and the general rule stated in 66 Corpus Juris Secundum, section 51, page 165, the District Court made the following finding:

> "While the conduct of the photographers was an unfortunate occurrence there is no showing of prejudice which cannot be assumed where neither the trial court nor the prosecutor was involved, and where the court admonished the jury to disregard the occurrence, calling the jury's attention to their duty to consider only the evidence admitted in the case. The trial court had an opportunity to consider the likely effect of this occurrence upon the jury and the likelihood of prejudice resulting to the defendant. His rulings on both occasions are to the effect that no

prejudice was shown. These determinations by the trial court are determinative on appeal in the absence of a clear abuse of discretion. We find no such abuse." [R. p. 83.]

The California Supreme Court denied a hearing. [R. p. 87.]

In view of the findings of the trial court and the appellate courts of California, no Federal question is presented.

Stroble v. California, 343 U. S. 181, 72 S. Ct. 599, 604.

Conclusion.

Respondent asserts that a review of this record reveals that petitioner was afforded every right to which he was entitled, and that it cannot be said that he was in any way prejudiced by the brief occurrence brought about by strangers to the litigation during a recess in the proceedings. Since there was no State action tending to deprive petitioner of a fair trial and since his guilt was established by overwhelming evidence, respondent urges that no provision of the United States Constitution has been violated, and no Federal question is presented. For the foregoing reasons, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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